

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

In the Matter of)
)
Policy and Rules Concerning the Interstate)
Interexchange Marketplace)
)
Implementation of Section 254(g) of)
the Communications Act of 1934, as)
amended)

CC Docket No. 96-61

RECEIVED
MAY 27 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

JOINT COMMENTS OF AERIAL COMMUNICATIONS, INC. AND
UNITED STATES CELLULAR CORPORATION

Aerial Communications, Inc. ("Aerial")¹ and United States Cellular Corporation ("USCC"),² by their attorneys, respond to the Commission's Further Notice of Proposed Rulemaking (FCC 99-43) released April 21, 1999 ("Further Notice") in the above-captioned proceeding. Specifically, Aerial and USCC comment on how § 254(g) of the Communications Act of 1934, as amended, ("Act")³ should be applied to the interstate interexchange services offered by "affiliates" and how airtime and roaming charges should be considered under rate integration policies.

¹ Aerial provides PCS service in the Minneapolis, Tampa-St. Petersburg-Orlando, Houston, Pittsburgh, Kansas City and Columbus Major Trading Areas ("MTAs"). These MTA markets have a combined population of approximately 27.6 million.

² USCC provides cellular telephone service to approximately 2.3 million customers through 136 majority-owned and managed cellular systems serving approximately 17 percent of the land area and approximately 9 percent of the population of the United States (approximately 24.1 million people).

³ 47 U.S.C. § 254(g).

No. of Copies rec'd 014
List ABCDE

Introduction

Aerial and USCC agree with numerous commentors in preceding phases of this proceeding that the regulatory paradigm under which the Commission has imposed rate integration is fundamentally inconsistent, in the case of CMRS service providers, with the Commission's primary reliance upon competitive market forces to encourage the availability of cost-effective CMRS services throughout the U.S. The public benefits from competition within the CMRS industry in terms of expanded service offerings, innovative uses of new technologies, competitive pricing and qualitative improvements in existing services are documented annually in the Commission's reports to Congress under § 332(c)(1)(C) of the Act.⁴

Aerial and USCC supported the numerous Petitions for Reconsideration requesting that the Commission forbear from applying Section 254(g) of the Act and Section 64.1801 of the Commission's rules to CMRS providers. The Commission's denial of those petitions in its Memorandum Opinion and Order adopted December 31, 1998⁵ is now subject to a petition for reconsideration filed by Nextel Communications, Inc. ("Nextel") on March 4, 1999. Also the Cellular Telecommunications Industry Association has petitioned for review of the Commission's Rate Integration Order in the United States Court of Appeals for the District of Columbia Circuit (Case No. 99-1045). Aerial and USCC strongly urge the Commission to reconsider in response to the Nextel Petition its conclusion that Section 254(g) of the Act directly applies to the CMRS

⁴ 47 U.S.C. § 332(c)(1)(C).

⁵ Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Petitions for Forbearance, *Memorandum Opinion and Order*, CC Docket No. 96-61, FCC 98-347 (released December 31, 1998) ("*Rate Integration Order*").

industry.

In the event the pending petition of Nextel is not granted, Aerial and USCC request, in response to the Further Notice, that the Commission forbear from applying its CMRS rate integration affiliation requirement. Alternatively, the Commission should revise the literal definition of “affiliate” and “control” adopted in its Rate Integration Order. The Commission’s Further Notice references a proposal of AirTouch Communications, Inc. (“AirTouch”) that separate CMRS affiliates that are not identically owned [that do not have the same ownership structure] should not be required to integrate rates.⁶ Such a redefinition also would help to resolve the intrusive, burdensome and anticompetitive consequences of the current definition. The rigidity of the current definition is misplaced in an era of fluid and rapid changes in the ownership and control of communications companies, both domestically and internationally. The Commission should also find that airtime and roaming charges are not interexchange in character and therefore not subject to rate integration.

Discussion

The Commission’s statement that “...too stringent an affiliation rule could be unworkable and adversely affect pricing and customer choice, because of the complex nature of the CMRS market”⁷ is the salient point. Aerial and USCC are independently managed “affiliated” companies that offer totally separate PCS and cellular services using entirely different networks, billing systems, customer service facilities, and employee and management teams. With respect to Aerial and USCC, the Commission’s grant of forbearance or adoption of a revised definition of “affiliate” as proposed is

⁶ Further Notice, ¶ 21.

⁷ Further Notice, ¶ 23.

justified in the interest of ensuring maximum consumer benefits, including benefits under Section 254(g) of the Act.

For example, Aerial and USCC are both independently managed separate majority-owned subsidiaries of a holding company, Telephone and Data Systems, Inc. Each company has approximately 20 percent public ownership. In the case of Aerial, its common shares are NASDAQ-traded and are held by more than 3,000 beneficial owners. In the case of USCC, its common shares are traded on the American Stock Exchange and are held by more than 3,500 beneficial owners.

Since its launch in mid-1997, Aerial has experienced rapid subscription growth and now provides broadband PCS in six MTAs currently serving more than 330,000 active subscribers. USCC which began service in 1985 provides cellular telephone service to approximately 2.3 million customers as of March 31, 1999.

The rates and other terms and conditions of the service offerings of each are independently established and approved by the management of each company. There are no joint marketing or other management agreements between the companies with respect to rates or other terms and conditions of their respective service offerings. Aerial provides interstate interexchange services by reselling the toll services of Sprint Communications Company, L.P. ("Sprint") under its Aerial branded long distance service based on postalized rates. USCC provides its interstate interexchange services under resale arrangements with AT&T at rates in current AT&T interstate tariffs. In each case, the rate structures, although differing in detail, individually comply with the Commission's rate integration requirements.

The Commission's objectives in these proceedings is to preserve the consumer benefits from enhanced competition as well as to meet the goals of Section 254(g) of the Act. The public benefits

intended to be achieved through rate integration under Section 254(g) of the Act are not impaired or compromised by the fact that Aerial and USCC did not choose to resell the interstate interexchange services of the same interexchange carrier. In fact, Aerial's freedom to select any long distance carrier is testimony to Aerial's independence from its affiliate who could have benefitted from incremental traffic volume. Independently managed and operated companies, such as Aerial and USCC, should not be compelled to charge the same retail prices in each of their markets for all of their subscribers for interstate toll services. Similarly, they should not be forced to converge in their selection of providers of wholesale long distance services.

By allowing flexibility for independently managed CMRS affiliates to offer interstate interexchange services at rates and or terms and conditions which individually comply with Section 254(g) of the Act as proposed here, the Commission will be promoting the consumer benefits from enhanced CMRS competition. As commentators in this proceeding have pointed out, this flexibility also promotes beneficial competition among facilities-based long distance carriers "...in the upstream market for any long-distance resale."⁸ Aerial's and USCC's actual experience demonstrates a robust competitive selection process.

Furthermore, the provision of interexchange service on a resale basis by a CMRS provider should only be considered as ancillary service for the completion of a wireless originated call and, therefore, not subject to the same level of regulation as presubscribed retail interexchange services. This line of reasoning was recently adopted by the Kansas Corporation Commission ("KCC") in an Order Addressing Jurisdiction ("Order"), Docket No. 98-ARCC-427-SHO, released October 5, 1998.

⁸ Petition for Reconsideration, AirTouch (October 2, 1997), p. 15.

In the Order, the KCC determined that it does not have jurisdiction over Aerial's intrastate toll services because the resold toll service provided by Aerial is an integral and indistinguishable part of a wireless service option.

In the absence of any credible basis for claiming that the respective arrangements between Aerial and Sprint and between USCC and AT&T individually fail to comply with rate integration requirements, the Commission should reasonably conclude that the application of these requirements in these circumstances is not necessary to protect consumers. Said another way, there is no public policy benefit to force retail pricing uniformity on independently operated CMRS affiliates, especially for services that are an ancillary part of competitive wireless services.

Aerial and USCC also agree with other CMRS providers that airtime and roaming charges primarily reflect competitive local market conditions. They should not be considered as an integral part of interstate interexchange service for which customers receive a separate long distance charge. The Commission should find that airtime and roaming charges are not subject to rate integration.

Conclusion


As discussed here, the inflexible application of rate integration across affiliates in the circumstances presented here is not necessary to ensure just and reasonable rates. Nor is it necessary to protect consumers who will continue to be offered interstate interexchange services under rate structures that individually comply with rate integration requirements. Forced conformity of retail pricing of an ancillary service for two different customer sets has questionable public policy benefits. Forbearance in this instance will support the well documented public benefits from competition within the CMRS industry. Alternatively, the Commission should revise its definition of affiliate and control so that independently managed PCS and cellular systems are not required to use the same

facilities-based toll carrier for the interstate interexchange services that each resells. Also, the Commission has ample justification to conclude that because airtime and roaming charges are not interexchange in character, such charges should not be subject to rate integration.

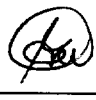
Respectfully submitted,

AERIAL COMMUNICATIONS, INC.

UNITED STATES CELLULAR CORPORATION

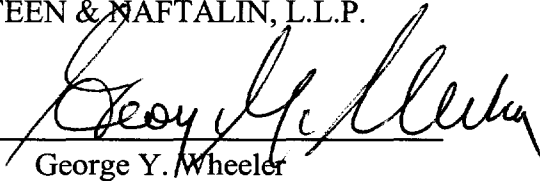
By Brian T. O'Connor 

Brian T. O'Connor, Esq.
Vice President, External Affairs
8410 West Bryn Mawr Avenue
Suite 1100
Chicago, IL 60631
(773) 399-7464

By Eva-Maria Wohn 

Eva-Maria Wohn
Vice President, External Affairs
8410 West Bryn Mawr Avenue
Suite 700
Chicago, IL 60631
(773) 399-8900

KOTEEN & NAFTALIN, L.L.P.

By George Y. Wheeler 

George Y. Wheeler
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 467-5700

May 27, 1999